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August 29, 1996

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*BY HAND DELIVERY*

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW - Room 222  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

**Re: Petition for Rulemaking of Scanlan Television, Inc.  
for Amendment of Section 73.606(b), Table of Allotments,  
Television Broadcast Stations (Marquette, Michigan),  
Filed June 25, 1996  
RM No. \_\_\_\_\_**

Dear Mr. Caton:

This letter is submitted on behalf of Barry Shapiro ("Shapiro"), an applicant for a construction permit to build a new television station at Channel 19 in Marquette, Michigan, 1/ in opposition to the above-referenced Petition for Rulemaking of Scanlan Television, Inc. ("Scanlan") to initiate a rulemaking proceeding for amendment of the television table of allotments to allot a new channel to Marquette, Michigan (the "Petition"). Neither Commission precedent nor the public interest supports the initiation of the requested rulemaking proceeding. Accordingly, the Commission should dismiss Scanlan's Petition pursuant to Section 1.401(e) of the Commission's rules.

Scanlan, like Shapiro, is one of six competing applicants for a construction permit to build a new television station at Channel 19 in Marquette. 2/ The proceeding to choose a permittee for Channel 19 has been stayed while the Commission reexamines its policy on comparative broadcast hearings. 3/ Scanlan

1/ FCC File No. BPCT-9604052L.

2/ FCC File No. BPCT-960111KO.

3/ See Reexamination of the Policy Statement on Comparative Broadcast Hearings, 9 FCC Rcd. 2821 (1994).

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has filed this Petition in an attempt to avoid the Commission's stay on comparative hearings. Scanlan asks the Commission to initiate a rulemaking to allot one of six channels to Marquette (channels 28, 39, 47, 51, 57 or 60), and to allow Scanlan to amend its current application for Channel 19 in Marquette to indicate the newly-allotted channel. Scanlan further requests cut-off protection at this new channel. 4/

**A. Scanlan's proposal is not supported by precedent.**

Scanlan contends that its proposal is consistent with Commission precedent. 5/ However, it cites to only *one* case, involving an allotment in Albion, Nebraska, to support its proposal. 6/ As shown below, the Commission's Albion decision involves a unique set of facts and does not support the allotment of a new channel in Marquette for Scanlan.

In Albion, the Commission allowed a competing applicant for a television station allotment to amend its application to specify operation at another channel without loss of cut-off protection. However, the Commission rendered this decision after *requiring* the applicant to file the application for the initial allotment in an effort to maintain service from an ABC network affiliate in the community of Albion, Nebraska. 7/ Citadel Communications, Inc. ("Citadel") was the licensee of KCAN(TV), Channel 8, Albion, Nebraska, which operated as a satellite of an ABC affiliate in Sioux City, Iowa. Upon application by Citadel, the Commission allotted Channel 8 to Lincoln, Nebraska, changed KCAN(TV)'s community of license to Lincoln, Nebraska, and allotted another channel (Channel 18) to Albion. However, the Commission conditioned the change in KCAN(TV)'s community of license on Citadel's pledge to file an application for Channel 18 in Albion and to operate Channel 18 as a satellite of its Sioux City, Iowa station. 8/ When Citadel filed an application for Channel 18, another party filed a competing application. The

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4/ Scanlan's Petition at 1.

5/ Id. at 4-6.

6/ See Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Albion, Nebraska), 10 FCC Rcd 11927 (1995) ("Albion") (affirming Report and Order, 10 FCC Rcd 3183 (1995)).

7/ Id.

8/ See Albion, Lincoln and Columbus, Nebraska, 8 FCC Rcd 2876 (1993).

Commission then permitted Citadel to amend its application for Channel 18 to specify operation at Channel 24. 9/

This decision does not support Scanlan's proposal in Marquette. First, unlike the Albion case, the Commission did not *require* Scanlan to apply for the Channel 19 allotment. Second, Scanlan does not have a construction permit conditioned upon its ability to acquire a permit in Marquette. Third, an immediate grant of a construction permit to build a new television station in Marquette is not necessary to maintain an existing service in Marquette. Fourth, there were only two competing applications for the Albion allotment, not six, as in the proceeding for the Channel 19 allotment in Marquette.

**B. Scanlan's proposal would not serve the public interest.**

Scanlan also argues that its proposal will serve the public interest by increasing media diversity in Michigan's Upper Peninsula. 10/ It further argues that the proposal will not be unfair to the other competing applicants for Channel 19 in Marquette because there are enough unallotted channels in Marquette to allot new channels and to provide cut-off protection to each of the competing applicants. 11/ Contrary to these arguments, Scanlan's proposal would not benefit the public interest.

The establishment of six new commercial television stations in a community of just 21,977 persons, 12/ located in a Designated Market Area ("DMA") of only 82,840 television households, 13/ would be ludicrous. By comparison, there are only six commercial television stations licensed to the city of Baltimore, Maryland, yet Baltimore has a population of approximately 726,000 14/ (more than

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9/ See Albion, 10 FCC Rcd at 11928, 11929-11930.

10/ Scanlan's Petition at 5-6.

11/ Id. at 6.

12/ See id. at 2.

13/ Broadcasting & Cable Yearbook 1996 at C-198.

14/ Statistical Abstract of the United States 1995, U.S. Department of Commerce, Bureau of the Census, at 44.

*thirty two times* the size of Marquette) and is located in a television market with 980,310 television households (more than *ten times* the number of television households in the Marquette DMA). <sup>15/</sup> A community as small as Marquette cannot support a total of seven commercial television stations. It would be a waste of valuable frequency spectrum and Commission resources to initiate six rulemaking proceedings and process six new television station applications when the majority of these new stations would be destined for failure.

In any event, it is unlikely that the other competing applicants for Channel 19 at Marquette would have the opportunity to apply for other allotments in Marquette. Since Scanlan filed its Petition, the Commission has imposed a freeze on all petitions for rulemaking to amend the television table of allotments. <sup>16/</sup> Therefore, if the Commission were to grant the Petition and subsequently allot a new channel to Scanlan, Scanlan could proceed with construction of a new station in Marquette while the competing applications for Channel 19 languish until the Commission resolves its comparative hearing criteria. Such a result would effectively render Scanlan the winner of the comparative proceeding for Channel 19. This flagrant violation of Section 308 of the Communications Act, as amended, and the Commission's procedures for selecting a new permittee that will best serve the public interest would be grossly unfair to the other Channel 19 applicants and would subvert the public interest.

**C. Scanlan's Petition reflects a pattern of ignoring Commission rules.**

Scanlan's effort to secure yet another allotment in Marquette, despite Commission precedent and public interest considerations to the contrary, would allow Scanlan to reap the fruits of its violations of the Commission's inconsistent applications rule, 47 C.F.R. § 73.3518. Scanlan should not be permitted to continue to flaunt compliance with the Commission's rules as it attempts to obtain as many overlapping channels as possible.

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<sup>15/</sup> Broadcasting & Cable Yearbook 1996 at C-159.

<sup>16/</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Further Notice of Proposed Rulemaking, FCC 96-317 at ¶ 61 (Aug. 14, 1996).

HOGAN & HARTSON L.L.P.

Mr. William F. Caton

August 29, 1996

Page 5

On November 16, 1994, Scanlan filed an application for a permit to construct a new television station to operate on Channel 10 in Ishpeming, Michigan. 17/ While this application was pending, and stalled by competing applications, Scanlan filed applications for permits to build new television stations in Crandon, Wisconsin, 18/ and Marquette, Michigan, 19/ even though these proposed stations have Grade A or B contours that would overlap the Grade A or B contour of Scanlan's proposed station in Ishpeming, in violation of the Commission's multiple ownership rules. 47 C.F.R. § 73.3555(b). 20/ An application is inconsistent or conflicting with an earlier pending application in violation of Section 73.3518 of the Commission's rules where, as in the case of Scanlan's multiple applications, grant of both applications would result in a prohibited contour overlap in violation of the multiple ownership rules. 21/ The inconsistent applications rule is intended "to avoid the waste of Commission resources, prejudice to other applicants, and delay of service to the public which arises when the Commission must process applications by the same person or entity." 22/

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17/ FCC File No. BPCT-941116KH.

18/ FCC File No. BPCT-950915KI.

19/ FCC File No. BPCT-960111KO.

20/ Scanlan has since requested the dismissal of its application for a permit in Crandon, Wisconsin. See Scanlan's Request to Dismiss Application (May 29, 1996).

21/ See New Life Enterprises, Inc., 7 FCC Rcd 843 (1992); Big Wyoming Broadcasting Corp., 2 FCC Rcd 3493 (1987).

22/ Valley Broadcasting Co., 58 R.R.2d 945 (1985). As a remedy for a violation of the inconsistent applications rule, the last-filed application -- in this case, Scanlan's Marquette application -- should be dismissed. Big Wyoming Broadcasting Corp., 2 FCC Rcd at 3494. Accordingly, Scanlan's Petition is moot in any event.

HOGAN & HARTSON L.L.P.

Mr. William F. Caton

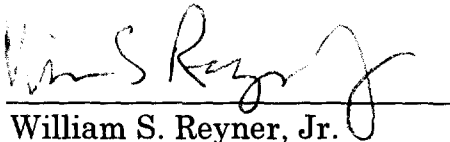
August 29, 1996

Page 6

A grant of Scanlan's Petition also would waste Commission resources and prejudice other applicants. Scanlan should not be permitted to continue skirting the Commission's rules and policies. Scanlan's Petition is not supported by the Commission's rules, precedent or public interest considerations. Accordingly, the Petition should be dismissed summarily.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By:   
William S. Reyner, Jr.  
Michelle M. Shanahan

Attorneys for Barry Shapiro

cc: Attached service list

## CERTIFICATE OF SERVICE

I, Daphene M. Jones, a legal secretary with the law firm of Hogan & Hartson L.L.P., do hereby certify that a copy of the foregoing Letter Opposing Scanlan Television, Inc.'s Petition for Rulemaking was mailed, postage prepaid by first class mail, this 29th day of August 1996, to the following:

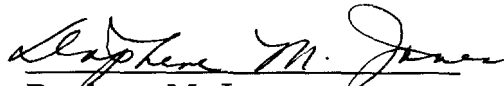
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